RESPONSE TO DEFENDANT'S MOTION TO SEVER

Rule 13.4(b), Ariz. R. Crim. P. -- The defense was not entitled to severance of counts arising out of one hit-and-run collision from counts arising out of a second collision minutes later because evidence concerning the events of each collision would be admissible at trial on the charges arising out of the other collision.

The State of Arizona, by and through undersigned counsel, hereby responds to defendant's motion to sever counts 1, 2, and 3 from counts 4, 5, and 6 and respectfully requests this Court to deny the motion, for the reasons set forth in the following memorandum of points and authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS:

The State adopts and incorporates by reference the facts as stated in its response to defendant's motion to suppress blood tests filed in this matter on October 18, 1999.

DISCUSSION:

The defendant is charged in this case with Count 1, Second Degree Murder; Count 2, Leaving the Scene of a Serious Injury or Fatal Collision; and Counts 3 through 6, Endangerment. All of these counts arise out of a brief, continuous sequence of events that took place on the evening of February 4, 1999. The defendant and the victim of Count 3 were told to leave the Classroom Bar at 51st Avenue and Northern. At 51st Avenue and Harmont, they became involved in a hit-and-run collision with the victims in Counts 4, 5, and 6, Annadee Sickles and her two children. The defendant and the victim of Count 3 continued about half a mile north to Butler where the defendant turned eastbound. Ms. Sickles followed the defendant to 47th Avenue, where she lost

sight of the defendant. The collision at 43rd Avenue and Butler occurred moments later. The entire sequence of events, beginning at the Classroom Bar at 51st Avenue and Northern and ending with the fatal collision at 43rd Avenue and Butler, involves all charged counts, covered a distance of approximately one and one-half miles, and took place in less than 15 minutes.

Rule 13.3(a)(2), Ariz. R. Crim. P., states in pertinent part that offenses may be joined if they are "based on the same conduct or are otherwise connected together in their commission."

Rule 13.4(b), Ariz. R. Crim. P., states in pertinent part:

> The defendant shall be entitled as of right to sever offenses joined only by virtue of Rule 13.3(a)(1), **unless evidence of the other offense or offenses would be admissible under applicable rules of evidence if the offenses were tried separately.**

(Emphasis added).

To prove Count 1, the State must show that the defendant acted recklessly and that he did so under circumstances manifesting extreme indifference to human life. A.R.S. § 13-1104(A)(3). Counts 3 through 6, endangerment in violation of A.R.S. § 13-1201(B), also require proof of reckless conduct.

The State will present the same evidence as proof of the elements of the defendant's reckless conduct exhibiting extreme indifference to human life in Count 1 and as proof of his reckless conduct in counts 3 through 6. This evidence includes the defendant's drinking at the bar, becoming belligerent and then being asked to leave. The evidence further includes the defendant's involvement in the first accident -- which he apparently caused -- endangering the victims of all charged counts. The evidence

further includes the fact that the defendant fled the scene of the first accident with Ms. Sickles following him in her car, then caused the fatal collision. Of course, all of the defendant's reckless conduct endangered his passenger as well as the people in the other cars.

Evidence that the defendant fled the scene shows a guilty state of mind as to all counts. His .234% blood alcohol concentration shows a level of intoxication that is also strong evidence of recklessness. The defendant became belligerent and was told to leave the bar. He was apparently fleeing the first hit-and-run collision at the time of the second, fatal collision. This evidence is crucial to prove the defendant's conduct manifesting extreme indifference to human life leading up to the second collision. If the State were to be precluded from presenting that evidence by severance of the first three counts from counts 4 through 6, the State would not likely be able to show that the defendant demonstrated the extreme indifference to human life necessary for second degree murder. If the State could only present evidence of what happened after the first collision, the State could probably only establish that the defendant acted recklessly and thus could only prove the lesser-included offense of manslaughter.

> It is the general policy in Arizona that joinder of crimes based upon the same conduct or otherwise connected together in their commission is permissible when such conduct is not prejudicial to the defendant.

Romley v. Superior Court (JV-126725, Real Party in Interest), 174 Ariz. 126, 129, 847 P.2d 627, 630 (App. 1993), citing *State v. Martinez-Villareal*, 145 Ariz. 441, 445-446, 702 P.2d 670, 674-675 (1985).

Joinder of different crimes in a single trial is permitted where the offenses arise out of a series of connected acts, and the offenses are provable by much the same

evidence. *State v. Martinez-Villareal, supra*, citing *State v. Gretzler*, 126 Ariz. 60, 73, 612 P.2d 1023, 1036 (1980); *State v. Via*, 146 Ariz. 108, 704 P.2d 238, 244-246 (1985), *cert. denied*, 475 U.S. 1048 (1986).

In this case, proof of the murder charge and the charge of leaving the scene are inextricably intertwined with proof of the endangerment charges. All arose out of the same course of conduct, and the element of recklessness, proven by the same evidence, is present in all but one of the charges. Indeed, proof of the first hit-and-run, which is relevant to prove all four endangerment charges as well as the murder count, would necessarily have to be admitted on the murder charge even if the endangerment counts were not charged. *Martinez-Villareal, supra*, citing *State v. Villavicencio*, 95 Ariz. 199, 201, 388 P.2d 245, 246-257 (1964).

CONCLUSION:

In this case, all of the charges arose from the same brief course of conduct, and the evidence to prove all charges overlaps. Therefore, the State asks this Court to deny the defendant’s motion to sever counts 1 through 3 from counts 4 through 6.